Supreme Court, U.S.
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No. 92-1598

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS W. CURLEY,

Petitioner,

against

CONSOLIDATED RAIL CORPORATION and EXCELSIOR TRUCK LEASING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(9844—LC9-681—1993)

QUESTION PRESENTED

Was it error for the New York Court of Appeals to affirm the Appellate Division's ruling which vacated a jury verdict and judgment in petitioner's favor on the grounds that, as a matter of law, the evidence was insufficient, without total speculation, to permit the inference that any negligent act or omission on Conrail's part caused petitioner's injuries.

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STATEMENT OF THE CASE

Due to several misstatements of fact in petitioner's "Statement of the Case", we will here set forth the salient facts based upon the record.

On March 6, 1984, petitioner was employed by respondent Consolidated Rail Corporation (hereinafter referred to as "Conrail") as a police officer. Petitioner testified that while on routine patrol in Rockland County, New York, the 1981 Ford LTD police car he was driving suddenly decelerated and came to an abrupt stop. Petitioner testified that although wearing a seat belt and shoulder harness, the vehicle's abrupt stop caused him to injure his back.

Petitioner commenced an action against Conrail for personal injuries under the Federal Employers' Liability Act based upon the alleged negligence of Conrail in failing to properly service and maintain its vehicle which

failure was the proximate cause of petitioner's injuries. Conrail commenced a third-party action against Ford Motor Company and respondent, Excelsior Truck Leasing Company (hereinafter referred to as "Excelsior") for breach of contract and negligence. The third-party action against Ford Motor Company was discontinued before trial.

The vehicle in question was leased to Conrail by Excelsior in July, 1981 for a term of two years. The alleged incident occurred subsequent to the expiration of the two year lease. The evidence at the trial showed that during the extended lease period, the primary responsibility for servicing the vehicle was Conrail's.

While the petitioner testified that several days prior to the alleged accident, he heard noises coming from the undercarriage of the vehicle and petitioner's fellow officer, James Libruk testified that approximately one year before the alleged accident the vehicle had come to an abrupt

stop, all of the other evidence at the trial, not only contradicted this testimony, but rendered it wholly and completely incredible. The petition asserts that the New York Court of Appeals failed to consider "evidence" adduced during the cross examination of the two expert witnesses called by Conrail. On page 6 of the petition the following language appears:

> Despite their direct testimony supportive of Conrail's position, on cross examination both witnesses made critical concessions indicating that this accident could well have occurred as petitioner claimed. Thus, the service manager admitted that the sudden stopping of the car could have been caused by pieces breaking off and jamming in the differential or in the transmission, or the emergency brake having accidentally engaged. He admitted that he had not inspected the transmission or the emergency brake cable . . .
>
> . . . He specifically [the Ford engineer] conceded that if a part had broken off and jammed in the gears of the differential, this could have caused the car to act as petitioner claimed it had.

While both expert witnesses indeed testified that it is possible for a vehicle to suddenly decelerate if a gear or other part breaks off and jams in the transmission or differential, in each case the cross examiner interrupted the answer of the expert and would not let him finish his answer. On redirect, each expert testified that if such an event occurred, the jam up or siezing of the transmission or differential which caused the deceleration would continue until repaired. Neither the transmission nor the differential could correct itself as it would appear from petitioner's testimony. Petitioner testified that, without warning the vehicle suddenly decelerated and then rolled to a stop. He further testified that he drove the car forward and backward while waiting for the tow truck without any recurrence of the problem.

Based upon all of the credible evidence, the New York Court of Appeals, and the Appellate Division before

that, found that there was insufficient evidence as a matter of law, without total speculation, to permit the inference that any negligent act or omission on Conrail's part caused petitioner's injuries.

The New York State Appellate courts did not ignore the precedents of this Court in arriving at their decisions. Each specifically found that the total failure of the evidence establishing negligence or a causal connection between any act or omission on the part of Conrail and petitioner's injuries mandated a reversal of the jury verdict, even under the liberal standard set by this Court in FELA cases. Except for the testimony of petitioner, there was no evidence whatsoever that he was actually injured on the job on March 6, 1984, that the automobile behaved in the way petitioner alleged or indeed that there was any mechanical problem with the vehicle whatsoever. It is the utter absence of proof that

compelled the New York Appellate courts to reverse the jury's finding in this case.

REASONS FOR DENYING THE WRIT

The Proofs Failed To Justify With Reason The Conclusion That Employer Negligence Played Any Part In Producing Petitioner's Injuries.

The petition discusses at length this Court's decisions in FELA negligence cases subsequent to its decision in Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351 (1930). For the most part, petitioner's discussions of these FELA decisions is accurate in that the petition fairly sets forth the holdings in each case. We submit however that the petition misses the mark in applying those decisions to the facts in the case at bar. More troublesome, however, is petitioner's characterization of the decision and motive of the New York Court of Appeals in affirming the reversal of the jury's verdict. It is regrettable that petitioner misrepresents the holdings of the New York Appellate

courts in his desperate attempt to get one more bite at the apple. As will be shown below, both the Appellate Division and the New York Court of Appeals carefully considered the standard of proof in FELA cases as enunciated in this Court's decisions, but nonetheless found, as a matter of law, that the evidence was insufficient to justify an inference that any act or omission on the part of Conrail caused petitioner's injuries.

The case at bar, as with all of the FELA negligence cases cited by petitioner, involves the question of whether there was evidence that any employer negligence caused the employee's injuries or more precisely, sufficient evidence to justify a jury's determination that employer negligence played any role in producing the injuries. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 116 (1963). See also Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957) in which this Court stated:

> Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury . . . (emphasis added)

The phrase "with reason" emphasized in the foregoing quotation clearly indicates an expression by this Court that the evidence causally connecting a negligent act or omission of the employer to the injuries of the employee must not be based upon pure speculation. We submit that the evidence adduced at the trial in the case at bar precludes an inference, with reason, that any act or omission on the part of Conrail was the cause of petitioner's injuries. In Tennant v. Peroria & Pekin Union R. Co., 321 U.S. 29, 32 (1943) this Court set forth the following test for causality in FELA negligence cases:

> In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident . . . Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." . . . If that requirement is met . . . the issues may properly be presented to the jury. (emphasis added)

Petitioner would have this Court believe that the necessary conclusion to be drawn from this Court's post-Toops decisions is that there is no standard of proof in FELA negligence cases and that a jury verdict may in fact be based totally upon speculation. Indeed, if one were to adopt petitioner's statement of the law on this issue, it would be difficult if not impossible to posit a set of facts which would justify a court from taking a FELA negligence

case from a jury. We respectfully submit that such is simply not the law.

In Lavender v. Kurn, 327 U.S. 645, 653 (1945), this Court addressed the issue of jury speculation in FELA negligence cases. In Lavender an employee was found injured on the track bed suffering from a fractured skull from which he subsequently died without regaining consciousness. There were no witnesses to the accident. Plaintiff produced "proof" that it was possible that the injury occurred when a mail hook, under extraordinary conditions, could have struck the employee while a train was backing up. There was contradictory "proof" that, due to the height of the hook in relation to the height of the employee while standing at various elevations it would be impossible to have occurred as alleged by the plaintiff. The jury returned a verdict in favor of the

plaintiff. This Court affirmed by stating at Id., 327 U.S. 653:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. (emphasis added)

The facts in the case at bar differ significantly from the cases decided by this Court which are relied upon by petitioner. In this case, the only evidence to support petitioner's version of the accident is his own testimony that he "believed" the wheels locked which allegedly caused him to fall forward and hurt his back

notwithstanding the seat belt and shoulder harness. However, on cross examination, as pointed out by the Appellate Division (A29), petitioner admitted that after the accident and before the tow truck arrived, petitioner believes that he moved the automobile forward and backward without any apparent difficulty. No skid marks were found at the site of the accident.

Conrail called two experts, the Service Manager at the Ford dealership which serviced the car and an engineer from Ford Motor Company. Notwithstanding petitioner's distortion of the testimony of these individuals, it is clear that their testimony renders petitioner's testimony incredible as a matter of law.

The Service Manager who inspected the automobile, hours after the accident, Mr. Kenneth Kikta, testified unequivocally that he took the car for a test drive and found no malfunctions whatsoever and that later that

day the drive-train and brake system were disassembled and inspected and found to be in working order, i.e., nothing was found which would explain the sudden deceleration alleged by the plaintiff. Petitioner falsely states that Mr. Kikta failed to inspect the emergency brake cable whereas in truth, as reflected in the record, Mr. Kikta testified that he had in fact inspected the cable and it was in working order. When Mr. Kikta was asked if it were possible for the car to suddenly decelerate if a damaged or worn part in the transmission or differential broke loose and jammed the mechanism, Mr. Kikta answered in the negative. Mr. Kikta testified that he personally inspected the differential and there was no such damage and that if such an event had occurred with the transmission, which he did not disassemble, it would not cause the car to decelerate, but rather would cause the transmission to slip, i.e., to roll free rather than come

to an abrupt stop. Mr. Kikta clearly indicated, however that in such an event the transmission would not right itself, but would remain in that condition.

When the Ford engineer, Mr. Thomas Shaw, was asked whether the accident could possibly have occurred as described by petitioner, he answered "my opinion is that there was no mechanical deficiency and that there was no accident". Mr. Shaw, who has extensive experience in the design of the transmission, differential, axles and other components of the drive-train on the model Ford LTD in question, further testified that had a worn or broken part broken off and jammed either the transmission or the differential thereby causing the axle to lock, it would have stayed locked and would have been found to have been locked until it was repaired. He further testified that, due to the engineering of the automobile in question and its specific center of gravity,

"nothing would have slowed the car down like [petitioner claimed]".

No other fact supports petitioner's claim as to the cause of the accident, not even his own records maintained in connection with the operation of the vehicle. Simply put, all of the evidence adduced at the trial, save for petitioner's own testimony, precludes an inference that any act or omission on the part of Conrail caused, even to the slightest degree, petitioner's injuries. Indeed, the only evidence that would indicate that petitioner's back injury occurred on the day in question is his own testimony.

Based upon the foregoing, we respectfully submit that the facts in the case at bar are clearly distinguishable from the facts in this Court's FELA decisions which are relied upon by petitioner. Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29 (1943) (employee struck by

train backing up without sounding warning bell required by employer's rules); Lavender v. Kurn, 327 U.S. 645 (1945) (employee found unconscious at track side with fractured skull with no witnesses and equally probative evidence presented that he was struck by mail hook on train or that he was murdered); Schultz v. Pennsylvania R. Co., 350 U.S. 523 (1955) (employee drowned while working on docked tug boats which were poorly lit and covered with ice); Rogers v. Missouri P. R. Co., 352 U.S. 500 (1957) (employee, after setting fire to weeds to clear track bed, was injured when he fell in retreat from flames which were fanned by a passing train); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) (employee developed severe complications from insect bite at a pool of stagnant water containing dead and decaying rats and pigeons, which condition had been permitted to exist by the employer for many years); Basham v. Pennsylvania R.

Co., 372 U.S. 699 (1963) (employee suffered injuries consisting of amputation of a finger caused by his dropping a 100 pound wheel spring on his finger immediately after the platform on which he was working moved).

In all of the foregoing cases, the inferences which could be drawn from the evidence, both those supporting plaintiff's case and contradicting it, were of similar or equal probative weight. In the case at bar, we respectfully submit that the overwhelming evidence which was uncontradicted, precludes as a matter of law, an inference that any act or omission on the part of Conrail contributed, even to the slightest degree, to the petitioner's injury. We further submit, given the facts in the case at bar, were petitioner to succeed, this Court would effectively rule that there is no standard of proof required of a plaintiff in a FELA case in establishing

negligence on the part of the employer and a causal connection between the negligence and petitioner's injuries.

We respectfully submit based upon the foregoing that the New York Appellate courts did not commit error in usurping the jury's function in this case. Both the Appellate Division and the New York Court of Appeals properly found that as a matter of law, the evidence was insufficient to justify an inference that any act or omission on the part of Conrail contributed, even to the slightest degree, to petitioner's injuries.

We further submit that with this Court's crushing case load, granting a writ of certiorari in this case would constitute a waste of this Court's precious time and resources. The words of Justice Frankfurter in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 532, 537 are as true today as they were then, viz.:

> Of course, cases raising questions that are not evidentiary, questions that fairly involve the construction or scope of the statute are appropriate for review here . . . But the ordinary negligence case under the Federal Employers' Liability Act does not satisfy the criteria that define the "special and important reasons" when a writ of certiorari will be granted . . .
>
> * * *
>
> In any event, the Court in these four cases has merely reviewed evidence that has already been reviewed by two lower courts, and in so doing it ignores its own stricture to the bar that "We do not grant a certiorari to review evidence and discuss specific facts."

Also appropriate on this point are the words of Justice Harlan in Basham v. Pennsylvania R. Co. 372 U.S. 699, 701, viz:

> A total of 12 New York Judges - one at nisi prius, four on the Appellate Division (a fifth dissenting) and seven on the Court of

> Appeals - have held that the evidence was insufficient to warrant submission of the case to the jury.[1]
>
> To bring such a case here for further review by nine more Justices seems to me a most futile expenditure of judicial time. Having reflected on the oral argument, briefs and record, I conclude that the only premise on which this reversal can be justified is that anything a jury says goes.

While Justices Frankfurter and Harlan were speaking in dissenting opinions, we submit that their words ring true today in this case. The record does not support the petition herein. Petitioner is merely seeking one further bite at the apple.

For all of the foregoing reasons, we respectfully submit that the writ should not be granted.

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[1] In the case at bar, 11 Judges have so held-five in the Appellate Division (the dissenting Judge agreed on this point) and six in the Court of Appeals, with one dissenting.

CONCLUSION

The New York Appellate courts correctly applied the law as enunciated by this Court, in holding, on these facts, that the evidence was insufficient, as a matter of law, to justify an inference that any act or omission by Conrail played any part in petitioner's injury.

Respectfully submitted,

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April 30, 1993

STATEMENT OF CORPORATE AFFILIATION

Excelsior Truck Leasing Company, the respondent third-party defendant, ceased doing business in April 1989. At that time it was the wholly owned subsidiary of S. L. Brown Co., 767 Fifth Avenue, New York, New York.